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CASE NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THURMAN H. HOWARD,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILROAD COMPANY,
Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI STATE CIVIL CASE

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QUESTIONS PRESENTED

May the Georgia Court of Appeals and/or the Supreme Court of Georgia refuse to apply Federal Law in an action brought under the Federal Employers' Liability Act, 45 USCA §51 et seq?

May an employee prove his unemployment during the time of his injury as an element to be considered by the jury is assessing damages where he maintains that the unemployment resulted from his injury-related disability and where the railroad maintains that the unemployment resulted from suspension for cause?

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 249 Ga. 713, and is reproduced in Appendix A at pages 1-7. The opinion of the Court of Appeals of Georgia is reported at 161 Ga. App. 560, and is reprinted in Appendix A at pages 8-14.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 8, 1982, (App. A, p. 1). A timely petition for rehearing was filed and denied on July 22, 1982. (App. A, p. 1). Jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

45 U.S.C.A. SECTION 51

> "SECTION 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FOR NEGLIGENCE; DEFINITION OF EMPLOYEES.
>
> "Every common carrier by railroad while engaging in commerce between any

of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C.A. SECTION 55:

SECTION 55. CONTRACT, RULE, REGULATION, OR DEVICE EXEMPTING FROM LIABILITY; SET-OFF.

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

STATEMENT

This action began as a suit for damages under the FELA for injuries sustained while petitioner was employed by the respondent railroad. During the trial, the petitioner introduced evidence which showed that he was injured, because of a broken coupling, on July 1, 1978. As a result of the injury, petitioner experienced back pain and was from time to time unable to work.

In July, 1980, petitoner was dismissed by the railroad allegedly for cause at a time when petitioner was marked off and not working because of the FELA injury.

Petitioner contends the railroad used the disciplinary action as a pretext for firing him in order to reduce its liability for lost wages in his pending FELA case. Petitioner, following appeal of his discharge through proper administrative procedures was reinstated by the railroad, without back pay, shortly before the trial of his injury case in 1981.

At the time of his discharge, petitioner was not able to work because of the injuries suffered in 1978 while employed by the railroad. At trial, petitioner contended that the railroad "fired" him in order to escape payment of approximately $11,000.00 in wages due him during the period from his firing until reinstatement. Petitioner argued that a jury question existed as to the effect of the discharge upon his right to recover damages for lost wages and future employ-

ability. The trial court permitted evidence of petitioner's unemployment to be introduced at trial and a jury verdict in petitioner's favor for $565,602.23 followed.

On appeal, the Court of Appeals of Georgia, Central of Georgia Railroad Company v. Howard, 161 Ga. App. 560 (1982) reversed, holding that the trial court should have granted the railroad's Motion for Mistrial because of the introduction of "grossly prejudicial" and irrelevant evidence at trial concerning petitioner's "firing" at trial as well as because of "abominably inflammatory" remarks made by petitioner's attorney concerning the "firing".

The Court of Appeals of Georgia did not cite any federal law or decision of any federal court in support of its reversal, even though ample federal law had been supplied to that Court through petitioner's briefs.

Certiorari was granted by the Supreme Court of Georgia to consider "whether the dismissal of Howard was relevant to the issues dis-

puted lost wages and/or future employability. Certiorari was vacated following oral argument and submission of multiple briefs by both parties. Howard v. Central of Georgia Railroad Company, 249 Ga. 713 (1982) (Smith and Gregory, JJ. dissenting) The dissent cited numerous FELA cases, including cases from the Supreme Court of the United States, to demonstrate that the evidence of the discharge was "highly relevant and probative on the issues of lost wages and future employability" was, therefore, properly admitted by the trial judge, thereby obviating any need for granting of the railroad's Motion for Mistrial.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia conflicts with principles established by the Court in Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490, 100 S.C. 755, 62 L.Ed.2d 689 (1980) and

Michigan R. Co. v. Vreeland, 227 U.S. 59, 33 S.C. 192, 57 L.Ed.2d 417 (1913). No federal law was cited by either Georgia Court. Yet, in Liepelt, the Court made clear the questions of damages in FELA actions are federal in nature, even where the case is brought in state court. In Vreeland, it was held that carriers are liable to their employees under the FELA for loss of time and diminished earning power.

II.

The decisions of the Georgia courts are irreconcilable with principles established in Alexander v. Gardner - Denver Company, 415 U.S. 36, 94 S.C. 1011, 93 L.Ed 2d 123 (1974). In Alexander, the Court held that an employee urging a Title VII employment discrimination claim was not bound by a prior arbitration award. The Court pointed out that where there exists a federal right independent of the right to administrative appeal, the employee was entitled to proceed under the independent substantive law. Such

rationale extends to the present case. Just as the plaintiff in Alexander had done, petitioner sought to have his claim for lost wages reviewed in his request for reinstatement under the Railway Labor Act. The railroad opposed petitioner's claim for lost wages and the burden was therefore on petitioner during the trial of his FELA case to show that his $11,000.00 lost wages resulted from his on-the-job injury. Petitioner's claim for back pay is an element of his damages under the FELA, and is separate and distinct from any arbitration remedies he may have. In Alexander, the court held that "[t]he distinctly separate nature of the contractual (i.e. in this case, arising under the Railway Labor Act) and statutory (i.e. in this case arising under the FELA) rights is not vitated hereby because both were violated as a result of the same occurrence." 415 U.S. at 49, 50. Therefore, petitioner should have been permitted to pursue each and every element of his lost wages claim during his lawsuit. Evidence of the arbitral decision should be

"admitted...and given such weight as the court (here the jury) deems appropriate." 415 U.S. at 60.

III.

The railroad's argument that it could use a disciplinary violation as a pretext for discharging an injured employee who could not work because of an FELA injury and that this discharge would effectively cut off all rights to future lost wages as well as the right to be compensated for inability to work and earn a living is violative of 45 USCA §55 which prohibits any "contract, rule or device" to defeat "any liability" under the FELA.

The United States Fifth Circuit Court of Appeals has implicitly rejected the railroad's argument in Hendley v. Central of Georgia Railroad Co., 609 F.2d 1146 (5th Cir. 1980) which held that matters arising under Congressional Acts of the United States (including the FELA) must proceed under such Acts in courts of law and

are not subject to administrative action under the Railway Labor Act.

IV.

The decisions of the Georgia Courts is directly in conflict with the federal law set forth in Barnes v. Norfolk Southern Railway Co., 333 F.2d 192 (4th Cir. 1964), which is on "all fours" with the present case. In Barnes, the court noted: "Appellant next urges that the trial judge improperly permitted Barnes to prove his unemployment at the date of the trial as an element to be considered by the jury in assessing damages. In an attempt to escape liablity for his continuing unemployment, appellant offered evidence that Barnes was rehired by the company subsequent to his injury, but had been thereafter suspended for cause...Barnes, of course, maintained that the real reason for his suspension ...was his disability."

Significantly, the United States Court of Appeals for the Fourth Circuit held: "We think Barnes' unemployment was a proper matter

for jury consideration. Appellant was afforded full opportunity to explain its version of the reasons involved in Barnes' suspension and continuing unemployment. The jury was free to believe appellant's or Barnes' version, but we think the choice was properly theirs." 333 F.2d at 197.

Similarly, in the present case, in order for petitioner to prove his lost wages and his loss of ability to work, it was necessary for Howard to place into evidence the circumstances surrounding his discharge and his status at the time of the discharge. As in Barnes, the railroad was afforded full opportunity by the trial judge to explain its version of the reasons involved in Howard's discharge, but the choice of whom to believe was within the province of the jury, and their choice was demonstrated by the $565,602.23 verdict in favor of Howard.

V.

Remarks of petitioner-Howard's attorney

concerning the circumstances surrounding his discharge and his status at the time of the discharge were clearly authorized by Georgia State Court cases interpreting the FELA. Seaboard Coast Line Railroad Company v. Towns, 156 Ga. App. 24 (274 S.E.2d 74) (1980). If evidence of petitioner's dismissal was relevant to the issues of lost wages and future employability, as it clearly was shown supra, then petitioner's counsel was properly permitted "to draw deductions" from that evidence by the trial court. Towns, supra at 26.

CONCLUSION

If allowed to stand, the decisions of the Georgia courts in the instant case will be a dangerous precedent under which employees asserting FELA will have their rights to damages for lost wages and future employability effectively curtailed at any time a railroad desires to escape liability therefor through the pretext of discharging that employee allegedly "for cause".

By artful use of the suspension/discharge machinery, a railroad will be able to prevent a jury from ruling upon significant elements of damages present in virtually all FELA cases by confining a plaintiff the administrative procedures of the Railway Labor Act in clear contravention of the above cited federal statutory and decisional law.

For the above stated reasons, this Court should issue grant the Writ of Certiorari and reverse the decisions of the Georgia courts summarily or should set this case for briefs and argument.

Respectfully submitted,

LAW OFFICES OF BILLY E. MOORE

BY: _____
BILLY E. MOORE
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE ON APPELLEE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served the foregoing Petition for Certiorari upon Central of Georgia Railroad Company, Respondent, by mailing copies of the same properly addressed, postage prepaid, to Mr. Ellsworth Hall, Jr.; Mr. John B. Miller; Mr. Bert DeRieux; and Mr. Hugh M. Dorsey, Jr.; attorneys of record for Respondent Central of Georgia Railroad Company.

This 15th day of October, 1982.

BY: _____
BILLY E. MOORE

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